

consider the appeal, and may, in his or her sole discretion, meet with the supplier to discuss the merits of the appeal. The Agency Head shall make a prompt written decision with respect to the merits of the appeal, a copy of which shall be sent to the supplier. The Agency Head's decision shall be final. The Agency Head may not delegate the authority to make a decision on the appeal to the ACCO.

**Section 2-08**

**SUPPLIER RESPONSIBILITY AND APPEAL OF  
DETERMINATION OF NON-RESPONSIBILITY.**

(a) Policy.

(1) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.

(2) The award of a contract to a contractor based on lowest evaluated price alone can be false economy if there is subsequent default, improper or exaggerated claims, late deliveries, or other unsatisfactory performance resulting in additional contractual and administrative costs. While it is important that City purchases be made at the lowest price, this does not require an award to a contractor solely because that contractor submits the lowest offer. A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.

(b) General Standards.

(1) A responsible contractor is one which has the capability in all respects to perform fully the contract requirements and the business integrity to justify the award of public tax dollars.

(2) Factors affecting a contractor's responsibility may include:

(i) financial resources;

(ii) technical qualifications;

(iii) experience;

(iv) organization, material, equipment, facilities, and personnel resources and expertise (or the ability to obtain them) necessary to carry out the work and to comply with required delivery or performance schedules, taking into consideration other business commitments;

(v) a satisfactory record of performance;

(vi) a satisfactory record of business integrity;

(vii) where the contract includes provisions for reimbursement of contractor costs, the existence of accounting and auditing procedures adequate to control property, funds, or other assets, accurately delineate costs, and attribute them to their causes; and

(viii) compliance with requirements for the utilization of small, minority-owned, and women-owned businesses as subcontractors.

(3) Failure of a firm to provide relevant information specifically requested by the Contracting Officer may be grounds for a determination of non-responsibility.

(c) Special Standards.

(1) When it is necessary for a particular contract or class of contracts, the Contracting Officer shall develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when experience has demonstrated that certain minimum experience or specialized facilities are needed for adequate contract performance.

(2) The special standards shall be set forth in the solicitation (and so identified) and shall apply to all bidders/proposers.

(3) Special standards must be based on demonstrated need and must not be used to artificially limit competition.

(d) Ability To Meet Standards.

(1) The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

(i) evidence that such contractor possesses such necessary items;

(ii) acceptable plans to subcontract for such necessary items; and

(iii) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

(2) A prospective contractor that has performed unsatisfactorily shall be presumed to be non-responsible, unless the Contracting Officer determines that the circumstances were beyond the contractor's control or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of non-responsibility.

(e) VENDEX Questionnaire.

(1) Definitions. For purposes of this section only, the following definitions apply:

Affiliate. An entity in which the parent of the contractor owns more than fifty percent of the voting stock, or an entity in which a group of principal owners which owns more than fifty percent of the contractor also owns more than fifty percent of the voting stock.

Contract. Any agreement between an agency, elected official, or the Council and a contractor, or any agreement between such a contractor and a subcontractor which:

(i) is for the provision of goods, services, or construction and has a value that when aggregated with the values of all other such agreements with the same contractor or subcontractor and any franchises or concessions awarded to such contractor or subcontractor during the immediately preceding twelve-month period is valued at \$100,000 or more, or

(ii) is for the provision of goods, services, construction, or construction-related services, is awarded to a sole source, and is valued at \$10,000 or more.

Contractor. All individuals, sole proprietorships, partnerships, joint ventures, or corporations who enter into a contract, as defined herein, with an agency, an elected official, or the Council.

Officer. Any individual who serves as chief executive officer, chief financial officer, or chief operating officer of the contractor, by whatever titles known.

Parent. An individual, partnership, joint venture, or corporation which owns more than fifty percent of the voting stock of a contractor.

Principal Owner. An individual, partnership, joint venture, or corporation which holds a ten percent or greater ownership interest in a contractor or subcontractor.

Subcontract. Any contract, as defined herein, between a subcontractor and a contractor.

Subcontractor. An individual, sole proprietorship, partnership, joint venture, or corporation which is engaged by a contractor pursuant to a contract, as defined herein.

(2) Obligation to File Questionnaires. Such questionnaires, known as "VENDEX questionnaires" shall be completed and filed by the contractor:

(i) at the time of an application for inclusion on a prequalified list or

(ii) when requested by the agency, but in any event before the Recommendation for Award is approved or not later than:

(A) thirty days after registration of the contract in the case of a contract of whatever value if the aggregate value of City contracts, franchises, and concessions awarded to that contractor including this one during the immediately preceding twelve-month period equals or exceeds \$100,000, and

(B) thirty days after registration of the contract, where permitted pursuant to paragraphs (3) and (4) of this subdivision.

Subcontractors shall be obligated to complete and file VENDEX Questionnaires within thirty days after the ACCO has received from the prime contractor written notification of the identity of the proposed subcontractor and granted preliminary approval, if the aggregate value of City contracts, franchises, and concessions awarded that subcontractor including this one during the immediately preceding twelve-month period equals or exceeds \$100,000.

(3) Late Filing of Information: When Permitted. The VENDEX questionnaire may be submitted within thirty days after registration of the contract as provided in paragraph (4) of this subdivision in the following circumstances:

(i) emergency procurements as defined by Section 3-06 of these Rules;

(ii) accelerated purchases as defined by Section 3-07 of these Rules;

(iii) on a contract-by-contract basis where the CCPO, upon the written request of the ACCO, has determined in writing that expedited procurement action is required due to urgent circumstances;

(iv) buy-against procurements pursuant to Section 4-07 of these Rules where the contractor has not previously submitted a VENDEX questionnaire; and

(v) on a contract-by-contract basis with respect to information not required by local law where the CCPO, upon the written request of the ACCO, has determined in writing that a specific portion of the information required by the questionnaire but not by local law is not accessible to the contractor despite good faith efforts to complete the filing in a timely fashion. The determination shall set forth with particularity the information which may be submitted late and the reasons for the later completion of the filing, and shall include the specific date by which the information shall be submitted.

(4) Late Filing of Information Required Findings. In the circumstances set forth in paragraph (3) of this subdivision, the VENDEX questionnaire may instead be submitted after registration of the contract, provided that:

(i) the ACCO has notified the contractor in writing of its obligation to submit the VENDEX questionnaire as set forth in subdivision (e)(2) above;

(ii) the ACCO has determined in writing that sufficient information concerning the prospective contractor is otherwise available to permit the determination of responsibility prior to receipt of the questionnaire; and

(iii) in addition, where the basis for the delayed submittal is an expedited procurement action due to urgent circumstances, the ACCO must provide a separate additional written determination setting forth the specific documented reasons it is not feasible for the contractor to complete all or some specific portion of the VENDEX questionnaire as set forth in subdivision (e)(2) above. The ACCO's determination shall include the name and telephone number of the authorized representative of the contractor who

provided information on which the ACCO relied in making the non-feasibility determination.

(5) Exemption: Information Not Required by Local Law. On a contract- by-contract basis, where a contractor demonstrates compelling reasons that it is not feasible to supply a specifically identified portion of information which is required by the questionnaire but not by local law, the CCPO may exempt a contractor from the requirement to supply that portion of the required information, upon the written application of the ACCO setting forth with particularity:

- (i) the efforts to obtain the required information;
- (ii) the name and telephone number of the authorized representative of the contractor who made the request for exemption on behalf of the contractor;
- (iii) the information to be covered by the exemption;
- (iv) the compelling reasons why an exemption should be granted in this case, including why the circumstances are such that it is in the best interests of the City that the contract be awarded to this contractor; and
- (v) the basis for finding the sufficient information concerning the prospective contractor is otherwise available to permit the determination of responsibility absent the exempted information.

In these cases the CCPO shall state in writing the reasons that granting the exemption serves the best interests of the City and shall provide a copy of this written determination to the Comptroller within five days.

(6) Exemption: Sole Source. In the case of a specific contract awarded in accordance with the sole source provision of Section 3-05 of these Rules where a contractor refuses to supply some portion of the required information, but the need for the goods, services, or construction is such that is in the best interests of the City that the contract be awarded, the CCPO may exempt the contractor from the requirement for some specifically identified portion of information required by local law concerning the creation and maintenance of a computerized data base upon the written application of the ACCO setting forth with particularity:

- (i) the efforts to obtain the required information;

(ii) the name and telephone number of the authorized representative of the contractor who refused, on behalf of the contractor, to supply the required information;

(iii) the information to be covered by the exemption;

(iv) the reasons why an exemption should be granted in this case; and

(v) the basis for finding that sufficient information concerning the prospective contractor is otherwise available to permit the determination of responsibility absent the exempted information.

(7) Reporting Requirement for Late Filings and Exemptions. A copy of the written request of the ACCO and the written determination of the CCPO permitting late filing of required information pursuant to subdivision (e)(3) and (4) of this section, or granting an exemption pursuant to subdivision (e)(5) and (6) of this section shall be filed by the CCPO with the Comptroller within five days after it is made or approved by the CCPO.

(8) Contract Terms and Conditions.

(i) Late Filing. Whenever the CCPO has permitted the filing of some or all of the required information within thirty days after the registration of the contract, the contract shall contain a clause requiring the submission of the required information within the required time period as a material term and condition of the contract and permitting termination without penalty to the City for violation of the condition, or in the event that:

(A) the Mayor or his/her designee determines on the basis of the belatedly filed information that it is in the best interest of the City to terminate the contract, and/or

(B) the Comptroller or his/her designee determines that the belatedly filed information reveals matters which if provided earlier would have provided a basis for an objection to registration of the contract by the Comptroller and the Mayor or his/her designee determines that he/she would have agreed with such determination and therefore it is in the best interest of the City to terminate the contract.

(ii) Subcontractors. Where appropriate, City contracts shall contain a clause requiring prime contractors to notify subcontractors of their obligation to complete and file VENDEX

Questionnaires within thirty days after the ACCO has granted preliminary approval of the identified subcontractor, if the aggregate value of City contracts, franchises, and concessions awarded to a subcontractor during the immediately preceding twelve-month period equals or exceeds \$100,000.

(9) Failure to Submit Information as Required: Consequences. Whenever a late filing of required information has been permitted in accordance with subdivision (c)(3) and (4) of this section and the contractor has failed to submit the required information within the required time period, that fact shall be communicated to the CCPO and the Comptroller immediately and shall be included within the VENDEX data base. Until such time as the required information has been filed with the CCPO,

- (i) no further contract shall be awarded to that contractor,
- (ii) the contractor shall be ineligible to bid or propose or otherwise be awarded a further contract, and
- (iii) no payments shall be made to the contractor for performance pursuant to that contract unless authorized in writing by the CCPO.

(10) The Procurement Policy Board shall provide the City Council with periodic reports concerning permission for late filings and exemptions at intervals and with contents agreed upon by the Procurement Policy Board and the City Council.

(11) The questionnaire responses shall be entered into the citywide computerized VENDEX database no later than the completion of the Recommendation For Award. Questionnaires need be completed only once every three years, so long as a prospective contractor certifies prior to each contract award that all information is current, accurate, and complete. If there have been changes, the contractor shall supply the changed information and shall certify that the updated information is current, accurate, and complete.

(f) Department of Investigation Prior to making its determination of supplier responsibility, the agency shall request the Department of Investigation to review the names on the Questionnaire and other information to ascertain whether the business or its affiliated individuals are or have, during a relevant period of time, been the subject of an investigation by the Department. The Department of Investigation shall undertake the review expeditiously and provide an explanation to an agency if its review is not completed within thirty calendar days of the request. If the Department of Investigation ascertains that there has been such an investigation, it shall provide a copy of any final



report or statement of findings to the Agency Head for use in making the determination of responsibility. If the results of the review are not made available to the agency within thirty calendar days of the request, the agency may make its responsibility determination on the basis of the information then available to it.

(g) Making the Responsibility Determination

(1) The Contracting Officer shall use the following sources of information to support determinations of responsibility or non-responsibility:

(i) the VENDEX database of debarred, suspended, and ineligible contractors;

(ii) VENDEX and other records of evaluations of performance, as well as verifiable knowledge of contracting and audit personnel;

(iii) determinations of violations of employment-related federal, state, or local law or executive order, including but not limited to those relating to equal employment opportunity, prevailing wage, workplace health and safety, employee benefits, and employee wages and hours;

(iv) information supplied by the prospective contractor, including bid or proposal information, VENDEX and prequalification questionnaire replies, financial data, information on production equipment, and personnel information;

(v) pre-award survey reports; and

(vi) other sources such as publications, suppliers, subcontractors and customers of the prospective contractor, financial institutions, other government agencies, and business and trade associations.

(2) Nothing in these Rules shall preclude a Contracting Officer, prior to award, from notifying the bidder or offeror of unfavorable responsibility information and providing the bidder or offeror an opportunity to submit additional information or explain its actions before adverse action is taken by the City.

(h) Written Determination of Non-Responsibility Required.

(1) If a bidder or offeror who otherwise would have been awarded a contract is found non-responsible, a written determination of non-

responsibility setting forth in detail and with specificity the reasons for the finding of non-responsibility shall be prepared by the Contracting Officer.

(2) A copy of the determination of non-responsibility shall be immediately sent to the non-responsible bidder or offeror. Notice to the non-responsible bidder must be mailed no later than two business days after the determination of non-responsibility is made and must inform the contractor of the right to appeal the determination to the Agency Head or designee within ten calendar days of receipt. A copy of the determination of non-responsibility shall also be sent to the Procurement Policy Board.

(3) The written determination of non-responsibility shall be made part of the agency contract file and included in the VENDEX database.

(i) Determination of Non-Responsibility. An agency letting a contract by competitive sealed bid or competitive sealed bid from prequalified suppliers may find the lowest responsive bidder(s) to be non-responsible in accordance with Section 2-08 of these Rules.

(j) Notice. After making a determination of non-responsibility, the ACCO shall notify the lowest bidder in writing of that determination. The notification shall state the reasons upon which the determination is based and shall inform the bidder of the right to appeal the determination of non-responsibility to the Agency Head and subsequently to the Mayor, and of the procedure for taking such appeals. The notification shall also contain the following statement:

The supplier shall also send a copy of its appeal to the New York City Comptroller, for informational purposes, at Office of the New York City Comptroller, Office of Contract Administration, 1 Centre Street, Room 835, New York, NY 10007, (212) 669-3000.

(k) Appeal to Agency Head. Appeals to the Agency Head of the determination of non-responsibility shall be made pursuant to the following procedure:

(1) Time for Appeal. Any bidder who is determined to be non-responsible in connection with the award of a particular contract shall be allowed ten days from receipt of the agency's notification to file a written appeal of that determination with the Agency Head. Receipt of notice by the supplier shall be deemed to be no later than five days from the date of mailing or upon delivery, if delivered. Filing of the appeal shall be accomplished by actual delivery of the appeal document to the office of the Agency Head.

(2) Form and Content of Appeal by Bidder. The appeal by the bidder shall be in writing and shall briefly state all the facts or other basis upon which the bidder contests the agency finding of non-responsibility. Supporting documentation shall be included.

(3) Agency Head Determination The Agency Head shall consider the bidder's appeal, and shall make a prompt written decision with respect to the merits of the bidder's appeal, except when such appeal relates to an Office of Labor Services determination of non-compliance with applicable equal employment opportunity requirements. Under such exception, the Office of Labor Services shall review all appeals and shall inform the Agency Head of its determination of the merits of the bidder's appeal. The Agency Head or head of the Office of Labor Services may, in his or her sole discretion, meet with the bidder to discuss his/her appeal.

(4) Notification to Bidder of Agency Head Decision A copy of the decision of the Agency Head shall be sent to the bidder. If the Agency Head upholds the ACCO's finding of non-responsibility, the Agency Head shall inform the supplier of the right to appeal the decision to the Mayor, and of the procedure for taking such an appeal.

(5) Delegation The Agency Head may designate a senior agency official, other than the ACCO or his or her subordinates, to consider this appeal.

(6) Finality. The Agency Head's decision of a bidder's appeal shall be final unless further appealed to the Mayor.

(l) Stay of Award of Contract Pending Agency Head Decision Award of the contract shall be stayed pending the rendering of a decision by the Agency Head unless the ACCO makes a written determination that execution of the contract without delay is necessary to protect substantial City interests.

(m) Appeal to Mayor. Appeals to the Mayor of the Agency Head decision upholding a determination of non-responsibility shall be made pursuant to the following procedure:

(1) Delegation The Mayor may delegate responsibility for deciding this appeal to the CCPO.

(2) Time for Appeal. Any supplier who wishes to appeal the decision of the Agency Head shall be allowed ten calendar days from receipt of the Agency Head's notification to file a written appeal of that determination with the Mayor or CCPO. Receipt of notification by the supplier shall be deemed to be no later than five days from the date of mailing or upon

delivery, if delivered. Filing of the appeal shall be accomplished by actual delivery of the appeal document to the Office of the Mayor.

(3) Form and Content of Appeal by Bidder. The appeal by the bidder shall be in writing and shall briefly state all the facts or other basis upon which the bidder contests the agency finding of non responsibility. Supporting documentation shall be included.

(4) Mayoral Determination. The Mayor or CCPO shall consider the bidder's appeal, and shall make a prompt written decision with respect to the merits of the bidder's appeal. The Mayor, in the Mayor's sole discretion, may meet with the bidder to discuss the appeal.

(5) Notification to Bidder of Mayoral Decision. A copy of the decision of the Mayor or CCPO shall be sent to the bidder.

(6) Finality. The decision by the Mayor or CCPO of a bidder's appeal from an Agency Head decision concerning non-responsibility shall be final.

(n) Stay of Award of Contract Pending Decision By Mayor or His Designee. Award of the contract shall be stayed pending the rendering of a decision by the Mayor or CCPO, unless the ACCO has made a written determination pursuant to these Rules that the execution of the contract without delay is necessary, or the Mayor or CCPO, in their discretion, determine that it is in the best interests of the City to go forward with the award of the contract.

(o) Documentation. Documents reflecting the agency determination of non-responsibility and any appeal and decision with respect to appeal, and evidence of having supplied written notifications as required by these Rules, shall be maintained in the agency contract file. Copies of these documents shall be sent to the CCPO for inclusion in the VENDEX database.

## **Section 2-09**      **RECOMMENDATION FOR AWARD.**

(a) Policy. The Contracting Officer shall prepare a written Recommendation for Award under the following circumstances:

- (1) procurements for goods and services exceeding \$10,000 and construction and construction-related services exceeding \$15,000 awarded by sole source procedures pursuant to Section 3-05 of these Rules, and
- (2) all other procurements exceeding the small purchase limits.